

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION**

FEDERAL TRADE COMMISSION,  
STATE OF CALIFORNIA, STATE OF  
COLORADO, STATE OF ILLINOIS,  
STATE OF INDIANA, STATE OF IOWA,  
STATE OF MINNESOTA, STATE OF  
NEBRASKA, STATE OF OREGON,  
STATE OF TENNESSEE, STATE OF  
TEXAS, STATE OF WASHINGTON, and  
STATE OF WISCONSIN,

Plaintiffs,

v.

SYNGENTA CROP PROTECTION AG,  
SYNGENTA CORPORATION,  
SYNGENTA CROP PROTECTION, LLC,  
and CORTEVA, INC.,

Defendants.

Case No. 1:22-cv-00828-TDS-JEP

**PLAINTIFFS' MEMORANDUM OF  
LAW IN SUPPORT OF THEIR  
MOTION TO STRIKE AS  
UNTIMELY DEFENDANT  
CORTEVA'S DEMAND FOR  
TRIAL BY JURY**

On March 15, 2024, Defendant Corteva, Inc. filed a demand for a jury trial “for all the issues so triable in Plaintiffs’ Complaint.” (Doc. 176). In making this demand, Corteva invoked Rule 38 of the Federal Rules of Civil Procedure, which permits a party to demand a jury trial “no later than 14 days after the last pleading directed to the issue is served.” Fed. R. Civ. P. 38(b)(1).<sup>1</sup> Corteva’s demand does not comply with the requirements of Rule 38 because it was filed 35 days after Corteva filed its Answer to Plaintiffs’ Complaint. (Doc. 166). Plaintiffs respectfully request that the Court strike Corteva’s demand as untimely.

**I. The Court Should Strike Corteva’s Jury Demand as Untimely.**

“The right to jury trial is not automatic. If not timely demanded, the right is waived.” *Gen. Tire & Rubber Co. v. Watkins*, 331 F.2d 192, 195 (4th Cir. 1964); *see also* Fed. R. Civ. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed.”). Under Rule 38, Corteva was required to make any jury demand no later than 14 days after its Answer, which it filed on February 9, 2024. Accordingly, Corteva had until February 23, 2024, to make a jury demand—almost 17 months after this case began. Corteva did not do so. Corteva waived its right to a jury, and its demand should be stricken as untimely. *See Gen. Tire & Rubber*, 331 F.2d at 193–95 (affirming the district

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<sup>1</sup> Corteva has not made a motion for a jury trial under Rule 39. *See* Fed. R. Civ. P. 39(b) (“Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.”). Should Corteva so move, Plaintiffs will review and respond to its arguments. Plaintiffs expect to oppose any such motion on the ground, among others, that the issues in this case are more appropriate for determination by a court than by a jury.

court's decision to strike the defendant's jury demand as untimely and rejecting a Seventh Amendment challenge)<sup>2</sup>; *see also Macsherry v. Sparrows Point, LLC*, 973 F.3d 212, 228 (4th Cir. 2020) (holding that a party failing to demand a jury trial within the time specified by Rule 38(b) waives a jury trial as a matter of right).

## **II. Corteva's Amended Answer Does Not Make Its Jury Demand Timely.**

Corteva may contend that it is permitted to serve the jury demand within 14 days of Corteva's March 1, 2024, Amended Answer. But that would be wrong. Fourth Circuit law is clear that an amendment or supplemental pleading revives a party's waived right to a jury trial only when that pleading raises significant, new issues, and only for those new issues. *See, e.g., U.S. ex rel. Automation Syst. Integrators v. BCE, Inc.*, No. 1:12-CV-250, 2013 WL 6628130, at \*3 (W.D.N.C. Dec. 16, 2013) (striking defendant's Rule 38(b) jury demand as "ineffective" when it was filed with an amended answer that "did not present any significant alteration or modification to what needed to be decided at trial"); *see also Gen. Tire & Rubber*, 331 F.2d at 196 n.5 (finding that amended filing that did not raise new issues on patent infringement and validity did not give rise to a renewed jury right on those issues). "The clarification of claims or defenses, or further explication of the same, is not tantamount to raising new issues and therefore does not confer anew the right to a jury trial." *Automation Syst. Integrators*, 2013 WL 6628130, at \*3. And to

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<sup>2</sup> Given the complexity of the issues present in that lawsuit, the Fourth Circuit also upheld the lower court's decision to deny the defendant's motion for a jury trial under Rule 39(b), emphasizing that there can be "no doubt that the waiver provisions of Rule 38 are constitutional." *Id.* at 197–98.

renew the right to demand a jury, “new issues” raised in an amended pleading must present new and material issues of fact, and not merely new legal theories. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 356 (2d Cir. 2007) (striking jury demand in the defendant’s amended answer because “an amended answer that asserts new defense theories based on the same facts does not reestablish the defendant’s right to demand a jury trial”); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 620 (9th Cir. 1979) (same); 8 Moore’s Federal Practice - Civil § 38.50[8](d) (2024).

Corteva’s Amended Answer corrects two typos and adds the following single affirmative defense: “Plaintiffs’ claims are barred, in whole or in part, by the applicable statute(s) of limitations, as the claims challenge programs that have been in place since before the applicable limitations period.” Doc. 174 at p. 48. This affirmative defense does not add any new factual issues to the litigation that resuscitate Corteva’s waived right to a jury. By its own terms, the affirmative defense turns on when the loyalty programs challenged in this litigation were first put in place—facts that have been present in the case since Plaintiffs’ original Complaint, filed September 29, 2022, and facts that Corteva admitted in its original Answer on February 9. Doc. 1 at ¶¶ 120 (describing when rimsulfuron was added to Corteva’s loyalty program), 130 (oxamyl), 139 (acetochlor). These facts do not appear to be in dispute. Corteva Answer, Doc. 166 at ¶¶ 127 (admitting that “Corteva placed rimsulfuron in its loyalty program beginning in the 2017-2018 market year”); 146 (admitting that “Corteva added acetochlor to its loyalty program in or about the 2016-2017 market year”).

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Plaintiffs in this case did not demand a jury trial for any of the claims that they bring against Corteva or its co-defendant Syngenta. For the limited number of claims in this matter that even may be tried to a jury as of right,<sup>3</sup> Corteva waived that right by not making its demand prior to the deadline set by Rule 38. Therefore, Plaintiffs respectfully request that the Court strike Corteva's demand for a trial by jury.

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<sup>3</sup> While not directly at issue in this motion, a number of the claims in this litigation do not create a right to a jury trial. *See, e.g., FTC v. Think All Publ'g, L.L.C.*, 564 F. Supp. 2d 663, 665 (E.D. Tx. 2008) ("Cases have unanimously held that the Seventh Amendment does not provide a right to a trial by jury in actions brought [by the FTC] under Section 13(b)."); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999) (claims for equitable relief, including injunctive relief, do not give rise to a Seventh Amendment right to a jury trial).

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Respectfully submitted,

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## **CERTIFICATE OF WORD COUNT**

I hereby certify that the foregoing brief complies with Local Rule 7.3(d) in that it contains fewer than 6,250 words as reported by word processing software.

Dated: April 5, 2024

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